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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN AVANT,

Defendant and Appellant.

H035941

(Santa Clara County
Super. Ct. No. CC829807)

Defendant Shawn Avant was convicted after jury trial of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹ and inflicting corporal injury on a cohabitant (§ 273.5, subd. (a)). The jury further found true the allegation that defendant personally used a dangerous and deadly weapon, a metal bar, in the commission of the assault within the meaning of sections 667 and 1192.7. The trial court found true allegations that defendant had two California prior serious felony convictions, one of which qualified as a strike. (§§ 667, subds. (a), (b)-(i), 1170.12.) The court sentenced defendant to 14 years in prison.

On appeal, defendant contends that the court prejudicially erred in admitting evidence of his prior conviction in Washington state for repeatedly violating a no-contact

¹ All further statutory references are to the Penal Code unless otherwise specified.

order because the evidence was irrelevant and unduly prejudicial. He further contends that the court prejudicially erred by instructing the jury with a modified version of CALCRIM No. 852. Lastly, defendant contends that reversal of his convictions is required due to the cumulative error. As we find no error requiring reversal, we will affirm the judgment.

BACKGROUND

Defendant was charged by first amended information with assault with a deadly weapon (§ 245, subd. (a)(1); count 1), and inflicting corporal injury on a cohabitant (§ 273.5, subd. (a); count 2). The information further alleged that defendant personally used a dangerous and deadly weapon, a metal bar, in the commission of the assault within the meaning of sections 667 and 1192.7, and that he had two prior California serious felony convictions, one of which qualified as a strike. (§§ 667, subs. (a), (b)-(i), 1170.12.)

Prior to trial, the People sought leave to admit evidence of defendant's 2007 felony conviction in Washington state for repeated violation of a no-contact order. (RCW § 26.50.110(1).) The People contended that the conviction was for domestic violence, and that the evidence was admissible pursuant to Evidence Code sections 1109 and 352. The court granted the People's motion over defendant's objection. The court also granted defendant's motion to bifurcate trial on the alleged California priors.

The Trial Evidence

Around Christmas in 2008, Mary Burgess had substance abuse problems and had been diagnosed with bipolar disorder, however she was not taking her medications. She was living at the Little Orchard shelter in San Jose and in her car, a gold 1986 Cadillac. She was 50 years old, she weighed about 145 pounds, and she was 5'4" tall. Defendant was her fiancé and he lived with her. He was 49 years old, he weighed about 205 pounds, and he was 5'9" or 5'10" tall. Both defendant and Burgess earned money by standing on corners waiving sales signs.

San Jose Police Officer Matthew Kurrle and his partner went to the Little Orchard shelter around 2:40 a.m. on December 25, 2008, in response to a report by a shelter employee of an assault with a deadly weapon. There, Officer Kurrle spoke with Burgess, who had multiple bruises and contusions. Burgess was upset, crying, and a little nervous, but coherent. The officer did not speak to Burgess at the shelter for very long because paramedics arrived and transported her to the hospital.

Officer Kurrle testified that he spoke to Burgess at the hospital for about 45 minutes and took photographs of her injuries. Burgess complained of pain in her left hand, the left side of her head, her right upper arm, and the back of her right shoulder, and she said that defendant had caused her injuries. The officer did not recall smelling any alcohol on Burgess, or observing symptoms of her being under the influence of alcohol or of a stimulant such as cocaine, but she said that she had drunk some brandy earlier that evening. Burgess also said that she had been living with defendant in her car, that they had gotten into an argument, and that defendant had hit her with a metal rod that he kept in the car, while saying, "I'm going to kill you." She said that she had been able to get out of the car and to run and hide in the area for about an hour until defendant drove away in the car. She then had walked to the Little Orchard shelter. She declined to have an emergency protective order and she did not ask to have defendant arrested.

Burgess testified that on the night of Christmas Eve 2008, she and defendant were staying in her car which was parked by Pomona Park. They drank some brandy and smoked some crack cocaine. She was feeling "argumentative and ready to fight." Defendant became argumentative and belligerent. They got into an argument, so Burgess got out of the car. She remembers running and falling more than once, trying to get away from the arguing. She does not remember defendant getting violent. She ended up at the Little Orchard shelter. The next thing she remembers is being treated at the hospital for a broken left hand, bruises on her right arm and back, and a bump on her head. She does not remember being interviewed by a police officer.

Burgess further testified that she did not want to testify against defendant because she did not want to see him go to jail. She still loves him as a friend. She did not show up for defendant's preliminary examination even though she was subpoenaed. She had to be brought to court for the trial by the prosecutor's investigator.

Defendant was arrested on December 27, 2008, after being stopped while driving Burgess's gold Cadillac. Defendant's license was expired, so the car was towed. During an inventory search, a metal pry bar and another metal bar were found in the trunk of the car.

People's exhibit No. 8, the documents relating to defendant's prior conviction in Washington state for repeated violation of a no-contact order, were admitted into evidence, but no testimony regarding the documents or facts underlying the conviction were presented.

Defendant did not testify in his own behalf or present any other testimony or evidence.

Verdicts and Sentencing

On April 28, 2010, while the jury was deliberating, defendant waived his right to a jury trial on the prior allegations. The jury then found defendant guilty of assault with a deadly weapon (§ 245, subd. (a)(1); count 1) and inflicting corporal injury on a cohabitant (§ 273.5, subd. (a); count 2), and found true the allegation that defendant personally used a dangerous and deadly weapon, a metal bar, in the commission of the assault within the meaning of sections 667 and 1192.7. On April 30, 2010, the court found the prior allegations to be true. (§§ 667, subds. (a), (b)-(i), 1170.12.)

On August 9, 2010, the court denied defendant's request to reduce the convictions to misdemeanors pursuant to section 17, and denied his request to strike the priors. It then sentenced defendant to prison for 14 years. The sentence consists of four years on

count 1 (double the lower term), with two consecutive five-year terms for the prior serious felonies, and a stayed four-year term (double the lower term) on count 2.²

DISCUSSION

People's exhibit No. 8

Background

Prior to trial, the People sought leave to admit evidence of defendant's 2007 felony conviction in Washington state for the third violation of a no-contact order. (RCW § 26.50.110(1).) The People contended that the conviction was for domestic violence and that the evidence was admissible pursuant to Evidence Code sections 1109 and 352. Certified copies of the official record of the conviction rather than live testimony was expected to be presented as proof. Defendant objected to the People's motion. After hearing argument from the parties on April 26, 2010, the court granted the People's motion but stated that it might revisit the issue if requested to do so.

Although a court reporter was present for the parties' arguments and the court's ruling on April 26, 2010, the reporter filed an affidavit stating that "no proceedings other than voir dire examination of the jury were held on the record." This court directed the trial court and parties to prepare a settled statement as to the oral proceedings regarding defendant's "objections to admission of evidence pursuant to Section 1109 of the Evidence Code." During a hearing held on May 5, 2011, the trial court made the following findings: "[T]he specific issue was not addressed in [defendant's] written motions in limine." "[T]he People questioned admission of the defendant's prior conviction in Washington state, that it be admitted pursuant to [Evidence Code section] 1109 . . . [and defense counsel] did object . . . under grounds [of Evidence Code

² A hearing pursuant to section 1170, subdivision (d) was held on January 5, 2011, during which the court deleted some ordered fines but did not otherwise change defendant's sentence.

section] 352.” “[Defense counsel] further objected that the Washington state prior conviction did not constitute a felony conviction under California law.” “[T]here was an objection based upon due process grounds” and “it’s more likely than not [that defense counsel] did object to the admission under both State Constitutional grounds and Federal Constitutional grounds.” However, neither the court nor the parties can “recall whether there was an objection made because the violation of restraining order wasn’t . . . squarely domestic violence conviction for [Evidence Code section] 1109 purposes.” No separate written settled statement was prepared or filed.

On April 27, 2010, outside the presence of the jury, the court stated on the record: “The Court’s understanding is that both counsel have had the opportunity to review the certified documents from Washington State regarding the defendant’s felony prior for a violation of a protection order. [¶] The Court understands that defense has objected to the admission of that prior and that there has been a prior record made on that issue. With that understanding, the Court requested that Counsel review the documents to see whether or not there could be an agreement in terms of which documents would be admitted, with the understanding that the defense continues to object to the admission of that document. [¶] The Court’s understanding is that both Counsel are in agreement with respect to what items could be introduced for purposes of that [Evidence Code section] 1109 prior, which will be People’s, for identification, Number 8. [¶] Is that a correct statement?” Defense counsel responded: “Yes, Your Honor. I am objecting to the entire document, but if the Court ruled that the document is . . . admissible, then I would ask that the Court consider just admitting the documents that are going to be marked next in line.” After the prosecutor stated that he was “in agreement,” the court marked and admitted into evidence the documents identified as People’s exhibit No. 8. The record on appeal does not contain “the entire document” that the People originally sought to admit.

People’s exhibit No. 8 contains the following: (1) Information No. 07-1-00690-0, a two-page information filed in the Superior Court of the State of Washington for

Whatcom County on May 17, 2007. The one-count information charged defendant with the violation of a “no contact, protection or restraining order” in that “on or about the 14th day of May, 2007, the said defendant, SHAWN AVANT, then and there being in said county and state, with knowledge that the Skagit County Superior Court had previously issued a protection order, restraining order, or no contact order . . . in State v. Shawn Avant, Cause No. 07-1-00339-7, did violate the order while the order was in effect and knowingly violating the restraint provisions therein and/or by knowingly violating a provision excluding him from a residence, a work place, a school or a day care and/or by knowingly coming within or knowingly remaining within a specified distance of a location and furthermore, the defendant has at least two prior convictions for violating the provisions of a protection order, restraining order or no contact order . . . ; contrary to Revised Code of Washington 26.50.110(1), which violation is a Class C Felony.”

(2) Seven pages of a 12-page judgment (pages 1, 2, 7, 9, 11, 12, and 8, in that order) for case No. 07-1-00690-0, filed on July 12, 2007. Pages 1, 2, and 7 of the judgment state in pertinent part: “The defendant was found guilty on **July 12, 2007** by **PLEA** of” count 1 “as charged in the Information.” “The crime(s) charged in Count(s) **COUNT 1** involve **domestic violence**.” “Substantial and compelling reasons exist which justify an exceptional sentence: **BELOW** the standard range for Count(s) **COUNT 1**.” The “TOTAL ACTUAL CONFINEMENT” ordered was “**90 DAYS CONSECUTIVE TO 120 SERVING ON OTHER MATTERS**.” “DONE: in Open Court and in the presence of the defendant this date: July 12, 2007.” Pages 9 and 11 of the judgment state in pertinent part: “Based upon the certificate of probable cause and/or other documents contained in the case record, testimony, and the statements of counsel, the court finds that the defendant has been charged with, arrested for, or convicted of a domestic violence offense, and further finds that to prevent possible recurrence of violence, this Domestic Violence No-Contact Order shall be entered pursuant to chapter 10.99 RCW. This order

protects: [¶] **MOLLY M. COOKE.**” “The court further finds that the defendant’s relationship to a person protected by this order is: **[xx] other family or household member as defined in RCW 10.99.**” “**THIS NO CONTACT ORDER EXPIRES ON: May 17th, 2012.**” “Done in Open court in the presence of the defendant this date: July 12, 2007.” Defendant signed both pages 7 and 11 of the judgment.

No testimony regarding defendant’s 2007 Washington state conviction was presented to the jury. However, the prosecutor later argued to the jury: “Exhibit 8 is . . . proof of the defendant’s conviction for a prior incident of domestic violence. A felony violation of a restraining order in Washington state, I believe, in 2007. I haven’t mentioned it, but we will talk about it now. And you can review it at your leisure. [¶] [It’s] a lot of legal documents. And you’ll notice that some of the pages have been omitted. Counsel, the Court, and I have taken out what is nonessential or inappropriate and left you with what are the appropriate documents in here [¶] The Exhibit 8, first page is what’s called an Information. And it says, ‘Violation of a no contact order,’ two-page document. . . . [A]fter that, there’s another document, which is many pages. We’ve only included some of them. Judgment and sentence, jail for this . . . felony violation of no contact order, third or subsequent violation. He has a domestic violence conviction is what he has here, and there’s a specific instruction on how to use that. [¶] I’m not going to read the whole thing to you. But if you decide that the defendant committed the uncharged domestic violence . . . you may but are not required to conclude from that evidence that the defendant was disposed or inclined to commit domestic violence. And based on that decision, you may also conclude that the defendant was likely to commit and did commit Counts 1 and 2 as charged here. [¶] If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider, along with all of the other evidence. It is not sufficient by itself to prove guilt or innocence. But what it’s saying is you may consider that to help prove that he is guilty in this case based on his past conduct, and that’s what it’s for. [¶] I’m

certainly not suggesting to you that he's . . . a bad person or anything like that. That's not your concern, whether you like him or like the victim or not. It's only what were the acts committed in this case, and that tends to show he did commit the domestic violence in this case."

As part of her closing argument to the jury, defense counsel argued: "The prior conviction that you will get, what it says when you read it is that there is an allegation against my client in 2007 that he violated a no contact order. That means that . . . the Court said do not have any contact with, and the name of the person there I believe is Mary Cook, do not have any contact at all. Speech, writing, smoke signals, none of that. It does not say that the allegation was that Mr. Avant hit someone. That's not what the prior is that you will be seeing. And you can review that."

As we discuss below, the court later instructed the jury regarding evidence of uncharged domestic violence with a modified version of CALCRIM No. 852.

The Parties' Contentions

Defendant contends that the trial court committed prejudicial error and violated his due process rights by admitting People's exhibit No. 8 into evidence pursuant to Evidence Code sections 1109 and 352 because the evidence was irrelevant and "so prejudicial that it rendered his trial fundamentally unfair." He argues that the evidence was irrelevant because the prior conviction "lacked similarity to the domestic violence assault charges for which he was on trial," and the conviction "did not show that [he] is predisposed to engage in domestic violence assault." He further argues that, not only did the evidence have no probative value, it was unduly prejudicial within the meaning of Evidence Code section 352. "[I]t tended to evoke a bias against [him] since it was a felony conviction, the documentation contained the words 'domestic violence,' and the court instructed and the prosecution argued that the jury could consider the documentation as evidence of [defendant's] propensity to commit domestic violence."

The People contend that defendant has forfeited his right to object on appeal that the evidence did not show that the offense he committed in Washington state was not a domestic violence offense by failing to raise that specific objection below. The People also contend that the Washington judgment expressly shows that defendant was convicted of a crime that involved domestic violence. “Thus, by its terms, the conviction involved a crime of domestic violence.” Lastly, the People contend that the conviction had great probative value and that the court did not abuse its discretion by deciding that the evidence was not substantially more prejudicial than probative under Evidence Code sections 1109 and 352.

Analysis

“ ‘Evidence of prior criminal acts is ordinarily inadmissible to show a defendant’s disposition to commit such acts. (Evid. Code, § 1101.) However, the Legislature has created exceptions to this rule in cases involving sexual offenses (Evid. Code, § 1108) and domestic violence (Evid. Code, § 1109).’ (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251.) ‘[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence.’ (*People v. Johnson* (2000) 77 Cal.App.4th 410, 420.) Section 1109, in effect, ‘permits the admission of defendant’s other acts of domestic violence for the purpose of showing a propensity to commit such crimes. [Citation.]’ (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1024 (*Hoover*); [citation].) ‘[I]t is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited.’ (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1333-1334, fn. omitted)’ (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232-1233.)

Evidence Code section 1109, subdivision (a)(1) provides in pertinent part that, “in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.” Subdivision (d)(3) of this section provides: “ ‘Domestic violence’ has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, ‘domestic violence’ has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense.”

Under section 13700, subdivision (b), “domestic violence” means “abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.” Under section 13700, subdivision (a), “abuse” means “intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself, or another.”

Family Code section 6211 expands the definition of “domestic violence” to include “abuse” committed against the child of the person, and “[any] other person related by consanguinity or affinity within the second degree.” Family Code section 6203 expands the definition of “abuse” to include “engag[ing] in any behavior that has been or could be enjoined pursuant to Section 6320.”

Evidence Code section 1109 does not violate a defendant’s due process rights. (*Hoover, supra*, 77 Cal.App.4th at pp. 1028-1029; *People v. Johnson, supra*, 77 Cal.App.4th at p. 420; see also *People v. Falsetta* (1999) 21 Cal.4th 903, 917-918 [construing Evid. Code, § 1108, a statute similar to § 1109 but dealing with uncharged sexual offenses].)

In *People v. Ogle* (2010) 185 Cal.App.4th 1138, the Court of Appeal held that stalking is an act of domestic violence within the meaning of Evidence Code section 1109, and therefore uncharged acts constituting stalking are admissible to prove propensity to commit the crime of making criminal threats. (*Id.* at p. 1140.) The court explained that Evidence Code section 1109 “applies if the offense falls within the Family Code definition of domestic violence even if it does not fall within the more restrictive Penal Code definition,” and further explained: “Family Code section 6211 defines domestic violence to require abuse and Family Code section 6203, subdivision (d) defines ‘abuse’ to include ‘engag[ing] in any behavior that has been or could be enjoined pursuant to Section 6320.’ Family Code section 6320 authorizes the court to enjoin a party from ‘stalking, threatening, . . . harassing, [and] telephoning,’ the other party. Thus, stalking a former spouse is domestic violence for purposes of section 1109 as defined by Family Code section 6211.” (*Id.* at p. 1144, citing *People v. Dallas* (2008) 165 Cal.App.4th 940, 952.)

In this case, People’s exhibit No. 8 showed that, in Washington state, defendant had been issued a no-contact, protection or restraining order involving Molly M. Cooke, who was a member of his family or household; that he pleaded guilty to knowingly violating the order on May 14, 2007, while the order was in effect; that this was at least the third time that defendant had violated the no-contact, protection or restraining order; and that, based on the entire record before it, the Washington state court found that the offense involved domestic violence. Since Evidence Code section 1109 permits the trial court in its discretion to utilize the definitions of domestic violence and abuse in section 13700 as well as Family Code sections 6211 and 6203, and the definition of domestic violence in those sections can apply to repeated violation of no-contact orders regarding a member of a defendant’s family or household (which acts would constitute harassing, stalking, or threatening behavior), evidence of a conviction for the repeated violations may be admissible under Evidence Code section 1109. On the record before us, we

cannot say that the trial court erred or abused its discretion in finding that defendant's Washington state conviction for repeatedly violating a no-contact order involving a member of his family or household, which conviction constituted domestic violence under Washington state law, also constituted a prior domestic violence conviction for purposes of Evidence Code section 1109. Therefore, we find that the trial court in this case did not err or abuse its discretion in finding People's exhibit No. 8 admissible under section 1109. (*People v. Ogle, supra*, 185 Cal.App.4th at p. 1144; *People v. Brown, supra*, 192 Cal.App.4th at pp. 1232-1233.)

"Even if the evidence is admissible under section 1109, the trial court must still determine, pursuant to [Evidence Code] section 352, whether the probative value of the evidence is substantially outweighed by the probability the evidence will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (*Hoover, supra*, 77 Cal.App.4th at pp. 1028-1029.) The court enjoys broad discretion in making this determination, and the court's exercise of discretion will not be disturbed on appeal except upon a showing that it was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; [*People v.*] *Brown, supra*, 77 Cal.App.4th at p. 1337.)" (*People v. Brown, supra*, 192 Cal.App.4th at p. 1233; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 281-282.)

In this case, the court properly found that the evidence of defendant's prior act of domestic violence was very probative of his propensity to engage in acts of domestic violence. Defendant was charged with committing domestic violence against a female cohabitant, and the evidence showed that he had engaged in at least one prior act of domestic violence with a female family member or member of his household during the time he was cohabitating with her, thereby showing his propensity for violence against female cohabitants. (Compare *People v. Ogle, supra*, 185 Cal.App.4th at p. 1144 [act of stalking was admissible to show propensity or predisposition to commit criminal threats],

with *People v. Earle* (2009) 172 Cal.App.4th 372, 397-400 [act of indecent exposure was not admissible to show propensity or predisposition to commit sexual assault].)

In addition, defendant's prior act of domestic violence was not prejudicially more inflammatory than the conduct for which he was charged. The record shows that Burgess, a female cohabitant, reported that defendant repeatedly hit her with a metal bar, bruising her arm and shoulder and breaking her hand. People's exhibit No. 8 showed only that defendant had been previously convicted of repeatedly violating a no-contact order involving a female cohabitant, and that the conviction involved domestic violence.

Defendant's prior act of domestic violence was not remote in time. The charged acts involving Burgess occurred in December 2008, while the prior act of domestic violence occurred in May 2007, just 18 months before.

The presentation of the evidence of the prior act of domestic violence did not involve an undue consumption of time, as the parties agreed to which parts of the originally proposed documentation on the prior domestic violence conviction would be shown to the jury and no testimony regarding the conviction or its underlying facts were presented. The evidence also showed that defendant had been convicted and punished for his prior act of domestic violence, therefore there was little if any risk that the jury might convict defendant of the offenses charged in this case in order to punish him for his prior acts.

On this record, we cannot say that the trial court erred or abused its discretion under Evidence Code section 352 in admitting People's exhibit No. 8 as propensity evidence under Evidence Code section 1109. No due process violation has been shown.

CALCRIM No. 852

During the on-the-record discussion of proposed instructions, the court noted that the prosecutor "provided 852 evidence of uncharged domestic violence; as well as 3515, multiple counts, separate offenses; 3517, with respect to lessers. [¶] Any concerns about those from the defense?" Defense counsel responded, "No, Your Honor." At the end of

the discussion, when the court asked the parties whether they had “any additional comments or requests,” defense counsel responded, “I don’t, Your Honor.”

The court’s instruction to the jury pursuant to CALCRIM No. 852 was as follows: “The People presented evidence that the defendant committed domestic violence that was not charged in this case, specifically, proof of a prior conviction for a violation of a restraining order in 2007 in Washington State. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence. [¶] Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. If you decide that the defendant committed the uncharged domestic violence, you may but are not required to conclude from that evidence that the defendant was disposed or inclined to commit domestic violence, and based on that decision, also conclude that the defendant was likely to commit and did commit Counts 1 and 2 as charged here. [¶] If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider, along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Counts 1 and 2. The People must still prove each charge and allegation beyond a reasonable doubt. Do not consider this evidence for any other purpose.”

On appeal, defendant contends that the court prejudicially erred by giving this modified version of CALCRIM No. 852. Defendant argues that defense counsel did not object to the instruction “because an objection would have been futile[; t]he trial court had already overruled [defendant’s] objection to the admission of the evidence underlying the instruction.” Defendant argues that, contrary to what the instruction told the jury, the documentation of his prior conviction for violating a no-contact order did not

support an inference that he was likely to commit and did commit the charges against him. And, he argues, the instruction did not “ ‘correctly state the law’ under Evidence Code section 1109, because it failed to define domestic violence as required by that section” and therefore removed from the jury’s consideration “the issue of whether a mere violation of a no contact order actually falls within the definition of domestic violence.”

The People contend that defendant waived any claim of error on appeal by specifically stating on the record that the defense had “no concerns” regarding CALCRIM No. 852 as proposed by the prosecution. The People further contend that the prior conviction did involve an act of domestic violence and that it was not necessary for the court to define domestic violence for the jury. “[T]he jury’s duty was to determine whether [defendant] committed the uncharged domestic violence, not whether the prior conduct constituted domestic violence.”

We have found that the trial court properly found that People’s exhibit No. 8 constitutes proof of a prior conviction for domestic violence which could support an inference that defendant had a propensity to commit domestic violence against a female cohabitant and therefore was likely to commit the charges against him. We further find that, after admitting People’s exhibit No. 8 into evidence, the court properly instructed the jury with CALCRIM No. 852 on the limited purpose for which the jury could consider the evidence and that any error by the trial court in failing to use a version of the instruction which includes a definition of domestic violence was harmless.

In *People v. Reliford* (2003) 29 Cal.4th 1007 (*Reliford*), the California Supreme Court approved CALJIC No. 2.50.01 (1999 Revision), which is analogous to CALJIC No. 2.50.02. The only material difference between the two instructions is that CALJIC No. 2.50.01 refers to “sexual offenses” and CALJIC No. 2.50.02 refers to “domestic violence.” CALCRIM No. 1191 and 852, like CALJIC Nos. 2.50.01 and 2.50.02, allow jurors to infer from evidence of similar uncharged misconduct, that is, sex offenses or

domestic violence, that the defendant “was likely to commit and did commit” the charged offenses. (*People v. Reyes* (2008) 160 Cal.App.4th 246, 251, fn. 2; *People v. Pescador* (2004) 119 Cal.App.4th 252, 261 (*Pescador*).) In *Reliford*, the court held that CALJIC No. 2.50.01 correctly states the law regarding the limited purpose for which the jury may consider the prior offenses and the prosecution’s burden of proof. (*Reliford, supra*, at pp. 1012-1013, 1016.) Relying on the analysis in *Reliford*, courts have held that CALJIC No. 2.50.02 meets constitutional due process requirements. (*People v. Brown, supra*, 77 Cal.App.4th at pp. 1335-1337; *Pescador, supra*, at pp. 261-262.) Similarly, there is no material difference between the language found constitutional in CALJIC No. 2.50.02 and the modified version of CALCRIM No. 852 given in the present case which did not define domestic violence. (*People v. Reyes, supra*, at pp. 251-252.) Therefore, although CALCRIM No. 852 does include a definition of domestic violence, and the better practice would be for the trial court to include a definition in its instructions to the jury, we reject defendant’s contention that the court prejudicially erred by instructing the jury with the modified version of CALCRIM No. 852 in this case.

Cumulative Error

Defendant contends that the “cumulative effect” of the court’s errors in admitting People’s exhibit No. 8 and in instructing the jury pursuant to CALCRIM No. 852 violated his right to due process under the federal and state constitutions. As we have found no error or abuse of discretion in the admission into evidence of People’s exhibit No. 8, and no prejudicial error in the giving of the modified version of CALCRIM No. 852, we reject defendant’s contention of cumulative error.

DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, ACTING P. J.

WE CONCUR:

MIHARA, J.

DUFFY, J.*

*Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.